(1)

91-128

NO: _____

Supreme Court, U.S.
FILED
JUL 3 1991
OFFICE OF THE CLERK

GERALD ADLER and GISELA ADLER

Petitioner

v.

COMMISSIONER INTERNAL REVENUE SERVICE

Respondent

On Appeal from the United States Court of Appeals for the Ninth Circuit.

PETITION FOR CERTIORARI

HENRY D. NUNEZ 063412
Attorney at Law
4969 E. Clinton, Suite 111
Fresno, California 93727
(209) 456-2494

Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Commissioner of Internal Revenue Service has met its burden of proof that the Statute of Limitations is not a bar to the notice of assessment of a partner when the Commissioner failed to introduce any evidence that a consent to extend the time to assess the tax was given by the partnership.

II. Whether the principle set out in Kelly v. Commissioner, 877 F2d 756 (9th Cir.1989) and Fendell v. Commissioner, 906 F2d 36 (8th Cir.1990) applies to the partnership tax return. The principle is that in order for the Commissioner to adjust tax liability, he must be able to do so at the source of income, in this matter the partnership.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION OF COURT BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
EXISTENCE OF JURISDICTION BELOW . . .	13
REASON FOR GRANTING WRIT	14
CONCLUSION	21

APPENDIX

A. OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (UNREPORTED)

B. MEMORANDUM OF FINDINGS OF FACT AND OPINION OF THE UNITED STATES TAX COURT 57 (T.C. MEMO 1376(1989))

C. INTERNAL REVENUE CODE SECTION 6501(A)

TABLE OF AUTHORITIES

CASES	PAGE
AVERS v. COMMISSIONER, 55 T.C.MEMO 678(1989) . . .	19
FENDALL v. COMMISSIONER, 906 F.2d 362(8th Cir.1990) . .	14, 17
KELLY v. COMMISSIONER, 877 F.2d 756(9th Cir.1990) . .	14,17,19,21
STATUES	
INTERNAL REVENUE CODE SECTION 6501(a)	3,12,16,18,19
INTERNAL REVENUE CODE SECTION 6501(c)(4)	3, 16
INTERNAL REVENUE CODE SECTION 6313(a)	13
INTERNAL REVENUE CODE SECTION 7459(c)	13
INTERNAL REVENUE CODE SECTION 7482(a)	13
INTERNAL REVENUE CODE SECTION 7483	14
28 USC SECTION 2101(a) . . .	3
RULES AND REGULATIONS	
FEDERAL RULES OF CIVIL PROCEDURE, RULE 13	14

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM 1990

No. _____

GERALD ADLER and GISELA ADLER

Petitioner - Appellant

v.

COMMISSIONER INTERNAL REVENUE SERVICE

Respondent - Appellee

On Appeal from the United States Court of Appeals for the Ninth Circuit.

PETITION FOR CERTIORARI

Petitioner, GERALD ADLER and GISELA ADLER (the Adlers) respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of appeals for the Ninth Circuit entered in the above-entitled

proceeding on April 4, 1991. (See App.A, page 1a)

OPINION BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit of which review is sought (See App.A, page 1a) is unreported. That ruling affirmed the opinion of the U.S. Tax Court, based upon the reasons set forth in the Tax Court opinion. (See App.A, page 1a) The Memorandum and Findings of Fact and Opinion of the United States Tax Court is reported in 57 T.C. Memo 1376 (1989) (See App.B, page 2a). The Honorable William M. Fay of the United States Tax Court ruled that the Statute of Limitations was not a bar to the tax assessment of tax imposed on the Petitioners for the tax years 1974, 1975 and 1977.

JURISDICTION

The unpublished opinion of the United

States Court of Appeal was entered on April 4, 1991. The jurisdiction of this Court is invoked under 28 USC §2101(a).

STATUTORY PROVISION INVOLVED

The pertinent provision of the statute involved is Internal Revenue Code Section 6501(a) and (C)(4) which is set out verbatim in App. C, page 17a and 18a.

STATEMENT OF THE CASES

This is a case for redetermination of deficiency in income tax for partnership items that were disallowed for the years 1974, 1975 and 1977. The deficiencies in income tax due from the Petitioners Federal Income Tax, as decided by the Tax Court, are as follows:

Year	Deficiency
12/31/74	None
12/31/75	$21,677.00
12/31/76	None
12/31/77	$ 3,937.64
12/31/78	$31,084.00
12/31/79	$13,035.98

As of the date the Notice of Deficiency was

issued (12/23/86), the Petitioners' tax matters were pending for the years ending 12/31/71, 12/31/72, 12/31/73, 12/31/74, 12/31/75, 12/31/76, 12/31/77, 12/31/78 and 12/31/79. The years ending 12/31/78 and 12/31/79 were resolved and not at issue. The tax years 12/31/71, 12/31/72 and 12/31/73 are not at issue in this proceeding.

The tax matters that are in dispute involve Petitioners' deductions with respect to partnership matters for all the years indicated. Petitioners were informed by Respondent that the partnership's returns were under audit and that Respondent needed more time to complete the audit of the partnerships and audit of the promoters of the investment. Petitioners themselves were not under audit. No evidence was presented by the Respondent that the partnership granted the Respondent a consent to extend the time to assess the tax

beyond the three (3) years Statue of Limitations. Petitioners, a partner, executed an individual consent form more than once for each year. On September 12, 1977, the 872 Consent was signed by Respondent for the year ended 12/31/74. Through successive forms 872, Consent to Extend the Time to Assess Tax, and a Form 872-A, Special Consent to Extend the Time to Assess Tax, the time to assess for taxable year 1974 was extended.

On April 8, 1976, Petitioners filed their Federal joint income tax return for taxable year 1975. Through successive Forms 872 and a Form 872-A, the time to assess for taxable year 1975 was extended indefinitely. Both Forms 872 and Form 872-A for taxable year 1975 were properly and timely executed by Respondent.

Petitioners filed their 1977 Federal joint income tax return on June 14, 1978. On

January 25, 1981, Petitioners signed a Form 872-A indefinitely extending the time to assess for taxable year 1977. The Form 872-A was timely and properly executed by Respondent.

The tax matters were pending since the tax period ending 12/31/71 and time was against Petitioners. During this lengthy time period records were lost and misplaced and are now not available. As a result of the delay by Respondent, witnesses became unavailable. As a result of the time delay and prejudice to Petitioners, Petitioners' attorney (on three different occasions 5/23/84, 3/22/85 and 9/20/85) sent proper and sufficient notices to Respondent revoking, canceling and nullifying the individual consent to extend the Statute of Limitations for the years at issue. Respondents did not respond to any of the notices sent by Petitioners' attorney. In the

notices sent by Petitioners' attorney, Respondent was informed that Petitioners did not have copies of the Consents to Extend the Time to Assess the Tax and Petitioners requested copies, since Petitioners' attorney did not know whether a consent to extend the time had been executed by Petitioners. Respondent did not respond to any of Petitioners' letters.

No Forms 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, were ever sent by Petitioners to the Internal Revenue Service office handling Petitioners' 1974, 1975, and 1977 tax returns. The IRS did not respond to letters from Petitioners' counsel. On December 23, 1986, Respondent mailed a Statutory Notice of Deficiency to Petitioners and a copy thereof to Petitioners' counsel. Respondent asserts, absent the mailing of Form 872-T, the

Petitioners have not terminated the consent to extend the time to assess the tax. Petitioners assert that the letters sent by Petitioners attorney did terminate the consent to extend the time to assess the tax or in the alternative the Statute of Limitations is a bar on the partnership since the three (3) years expired and Commissioner did not obtain a consent to extend the time from the partnership.

On or after June 10, 1987, Respondent, through the revenue agent, advised Petitioners that the consent to extend the statute for the years ending 12/31/74, 12/31/75, 12/31/76 and 12/31/77 had been revoked and expired. The representations were made by Respondent to persuade Petitioners to include in gross income deductions taken in partnership, Gibralter Associates, for 1974 ($19,519.00), 1975 ($27,217.00) and 1976 ($6,018.00) in the

taxable years 1984 and 1985. A promissory note in the Gibralter Associates partnership, pursuant to the terms of the note, had a due date of December 15, 1984, and since the note was not paid, Respondent indicated the amount was considered forgiveness of debt and must be included in gross income in 1984 and 1985. The investment and deductions were made and included in Petitioners' tax returns for the years 12/31/74, 12/31/75 and 12/31/76. The investments were with Gibralter Associates, a partnership which went out of business in 1980, and the note was canceled in 1980 by Gibralter Associates. The Statute of Limitations for 1980 had expired. A settlement was reached between Petitioners and Respondent. Since Respondent agreed with Petitioners that the statute of limitations for the years at issue had been revoked and expired, Petitioners agreed to include in

gross income in 1984 and 1985 the portion of the note which was forgiven in 1980. In this settlement Petitioners waived their rights on the issues that the forgiveness of debt was barred by the Statute of Limitations since the debt was forgiven in 1980. Respondent is now asserting that the Statute of Limitations for 12/31/74, 12/31/75 and 12/31/77 was not revoked and did not expire. This is in direct contradiction of the IRS agent's assertion. Had the statute not been revoked and expired, as represented by Respondent, Petitioners would not have agreed to adjust the 1984 and 1985 tax years since the IRS's position would be incorrect and prejudicial to Petitioners. The error is that you cannot disallow the deductions in 1974, 1975 and 1976, and also include the note (disallowed deductions) in gross income in 1984 and 1985. The Statute of Limitations for 1984 and 1985 has expired and

the transaction and settlement for 1984 and 1985 cannot be reversed.

Petitioners assert that the Internal Revenue Service may not adjust a partners return based upon adjustments pertaining to partnership matters when the Statue of Limitations has run on the partnership return.

Petitioners assert that the Form 872-A is ambiguous; that contract principles (covenant of good faith and fair dealings) apply; and the Doctrine of Estoppel applies to excuse or waive the requirement of use of the Form 872-T.

The Petitioners and Respondent settled the issues with respect to the merits of each year and filed stipulations dated February 10, 1989 and February 21, 1989, respectively. Petitioners and Respondent stipulated that the settlement of the issues did not foreclose the issues of whether or not the years involved

are opened or closed pursuant to IRC Section 6501. Petitioners and Respondent agreed to have the facts stipulated for trial purposes without the taking of oral testimony and filed the stipulations along with exhibits for trial. Petitioners timely filed a brief for Petitioners and a reply brief for Petitioners. Respondent timely filed a brief for Respondent and reply brief for Respondent.

On August 21, 1989, the Honorable William M. Fay of the United States Tax Court issued a Memorandum of Findings of Fact and Opinion and held that the assessment was not barred by the Statute of Limitations (See App.B, page 3a). The Tax Court held that in the absence of a Form 872-T, the Forms 872-A were not revoked. The Tax Court rejected Petitioners other arguments. The Tax Court entered a decision on November 21, 1989, pursuant to its Memorandum of Finding of Fact and Opinion.

On November 28, 1990, Petitioner filed a timely appeal of the decision of the United States Tax Court to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the Tax Court decision on April 3, 1991. (See App.A, page 1a)

EXISTENCE OF JURISDICTION BELOW

The United States Tax Court had jurisdiction of this action pursuant to the provision of 26 USC §6313(a).

The decision of the United States Tax Court appealed from was a final and appealable decision pursuant to 26 USC §7459(c) and United States Court of Appeal for the Ninth Circuit had jurisdiction to review the decision of the United States Tax Court pursuant to the provisions of 26 USC §7482(a).

The United States Tax Court entered its decision in this matter on November 28, 1989. The Petitioners' Notice of Appeal was filed

with the United States Tax Court on November 29, 1989. The appeal was timely filed in the Appellate Court pursuant to the provisions of 26 USC §7483 and Federal Rules of Civil Procedure, Rule 13.

REASON FOR GRANTING WRIT

In this case, the decision rendered by the Ninth Circuit Court of Appeal, affirming the United States Tax Court is inconsistent with its holding in Kelly v. Commissioner of the Internal Revenue 877 F.2d 756 (9th Cir.1989), which addresses a similar issue involving the Statute of Limitations. In addition the decision rendered in this matter conflicts with an Eighth Circuit case Fendell v. Commissioner of the Internal Revenue 906 F2d 36 (8th Cir.1990), which set forth guiding principle that any adjustment of tax liability must be done from the source of the income, in this matter the partnership. Therefore

Petitioners bring this writ so that this conflict may be resolved.

QUESTION NO. I. Whether the Commissioner of Internal Revenue Service has met its burden of proof that the Statute of Limitations is not a bar to the Notice of Assessment of a Partner when the Commissioner failed to introduce any evidence that a consent to extend the time to assess the tax was given by the partnership.

Petitioners in filing a petition asserted as an affirmative defense that the action was barred by the Statute of Limitations. The notice of deficiency is applicable to the tax years 12/31/74, 12/31/75, and 12/31/77. The statutory notice of deficiency was issued on 12/23/86. Petitioners have made a showing that the statutory notice was issued beyond the normally applicable period of limitations.

The general rule provided by Internal Revenue Code of 1954 as amended is Code

Section 6501(a) is that taxes must be assessed within three (3) years from the date the tax return was filed (See App.C page 17a). The Secretary and a taxpayer may enter into an agreement altering the general rule by extending the period for assessment. Section 6501(c)(4) (See App.C page 17a).

By establishing a prima facie case, Petitioners made it incumbent upon Respondent to go forward with evidence to show that the bar of the statute is not applicable. The burden of proof is therefore on Respondent. Respondent presented evidence that Petitioners for their individual tax returns executed consents to extend the time to assess the tax for the years at issue. Respondent, however, presented no evidence that a consent to extend the time to assess the tax was executed by the partnerships that were under audit. Respondent's purpose for obtaining a consent

to extend the time to assess the tax from Petitioners individually was that Respondent was auditing the partnership returns and that Respondent needed more time to complete the audit of the partnership and audit of the promoters of the investments. The Petitioners themselves were not under audit. Respondents have accordingly failed in its burden of proof that a consent to extend the time to assess the tax was given by the partnership for the years at issue. The Respondent accordingly did not carry its burden of showing that the bar of the Statute of Limitations is not applicable.

QUESTION NO. II. Whether the principle set out in Kelly v. Commissioner, 877 F2d 756 (9th Cir.1989) and Fendell v. Commissioner, 906 F2d 36 (8th Cir.1990) applies to the partnership tax return, the principle is that in order for the Commissioner to adjust tax

liability, he must do so at the source of income, in this matter the partnership.

Petitioners assert that the partnership items in an individual tax return cannot be assessed unless an extension to assess the tax on the partnership tax return in addition to the individual tax return is obtained by Internal Revenue Service. IRC Section 6501(a) sets forth in general that an income tax return cannot be questioned after three years from the date the return is filed. The Statute of Limitations exists in part so that after some time persons can be confident that their affairs are closed and they can dispose of old records. In the instant case, Petitioners had no control over the audit of the partnership and Petitioners' ability to defend against the Respondent's adjustment was dependent upon the partnership records, and managing partners who were both unavailable at

the date the notice of deficiency was issued (12/23/86). Issues such as profits motive are to be determined at the partnership level, (see Avers v. Commissioner (1988) 55 TC Memo 678, 685, and other cases cited therein). Other issues depend on the partnership transactions. The court in Kelly v. Commissioner, supra, stated at page 759:

> "The language of Section 6501 ('the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed') indicates that the tax imposed (in the case of an S corporation the tax owed by the shareholder on account of the S corporation's activities) must be assessed within 3 years after the filing of some return, but does not indicate whether the relevant return is the taxpayer's or the corporation's." (emphasis in original)

The same reasoning applies to the partnership's tax returns. In the instant case both the partnership and individual tax returns were filed.

Petitioners assert that the partnership's

items in an individual tax return cannot be assessed unless an extension to assess the tax on the partnership's tax return is obtained in addition to a consent to the individual return.

In order for the Commissioner to adjust tax liability, he must be able to do so at the source of income (here the partnership) or will be prevented from doing so at the point where the income is distributed, in this case the individual partner of the partnership. This principle is clearly indicated in where the Commissioner did not obtain a consent to extend the time to assess the tax from the trust. The Fendell Court cited similar cases and stated the principle at page 364 as follows:

> "These cases embody the principle that in order for the Commissioner to adjust tax liability, he must be able to do so at the source of income, here the Trust, or will be prevented from doing so at the point where the income is distributed, in

> this case the beneficiary of the Trust. This principle finds sound support in the concept of finality, as expressed by the Ninth Circuit in Kelly: 'The statute of limitations exists, in part, so that after some time persons can be confident that their affairs are closed and they can dispose of old records.' 877 F.2d at 758. The Commissioner had ample time to audit the Trust's returns for the years in question, and if he did not he could have obtained an extension of time to do so."

As stated above this principle is further supported by the Ninth Circuit where the court held that the Commissioner may not adjust a shareholders return based on adjustments on a Subchapter S corporation's return after the Statute of Limitations has run on the S corporation's return. Kelly Supra at 756.

CONCLUSION

For the reason stated above, Petitioner respectfully request that this Court grant this Petition for Writ of

Certiorari so this case can be reviewed by this Court.

Respectfully Submitted,

July , 1991.

HENRY D. NUNEZ*
Attorney at Law
4969 E. Clinton Ave.
Suite 111
Fresno, CA 93727
(209) 456-2494

*Counsel of Record
For Petitioner

APPENDIX A

N O T F O R P U B L I C A T I O N

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD ADLER; GISELA ADLER,	)	No. 89-70531
	)	Tx Ct. No. 7337-87
Petitioners-Appellants,	)	
v.	)	ORDER
COMMISSIONER INTERNAL REVENUE SERVICE	)	
Respondent-Appellee.	)	

On Appeal from the United States Tax Court

Submitted April 1, 1991
Pasadena, California

Before: NORRIS, HALL, and TROTT, Circuit Judges.

For the reasons set forth by the Tax

Court, we AFFIRM. See also Keren v. Commissioner, 902 F.2d 17, 18 (9th Cir. 1990); Kinsey v. Commissioner, 859 F.2d 1361, 1363-64 (9th Cir. 1988), cert. denied, 489 U.S. 1083 (1989).

APPENDIX B

UNITED STATES TAX COURT

[CCH Dec. 45,961(M)] Gerald Adler and Gisela Adler v. Commissioner.

Docket No. 7337-87. T.C. Memo. 1989-446. Filed August 21, 1989. [Appealable, barring stipulation to the contrary, to CA-9.-CCH.]

[Code Sec.6501]

Limitations: Assessment and collection: Waivers.-Letters by the taxpayer's attorney that purported to revoke any "waivers of the statute of limitations" for assessing tax after the taxpayer and the IRS had executed Forms 872 and 872-A were ineffective to terminate the extensions. The Tax court said that Form 872-A is unambiguous as to the means of termination of the extension and requires the filing of Form 872-T for effective termination. Contract principles, estoppel and due process do not demand that means of termination other than Form 872T be accepted.-CCH.

Henry D. Nunez, 140 W. Shields, Fresno, Calif., for the petitioners. Robert J. Misey, Jr., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

FAY, Judge: Respondent determined deficiencies in and additions to petitioners'

Federal income tax as follows:

Year	Deficiency	Section 6653(a)[1]
1974	$19,607	$962
1975	$54,209	$2,666
1976	$18,609	$689
1977	$16,528	$826
1978	$38,148	$1,907
1979	$27,661	$1,383

After settling years 1976, 1978 and 1979, and after reaching concessions with respect to 1974, 1975 and 1977, the only issue that remains for decision is whether the statute of limitations bars assessment for taxable years 1974, 1975 and 1977. We hold that assessment was not barred by the statute of limitations.

The parties submitted this case fully stipulated pursuant to Rule 122. The

---

[1] All section references are to the Internal Revenue Code of 1954 as amended and in effect for the years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

Stipulation of Facts and related exhibits are found accordingly and incorporated by reference.

FINDINGS OF FACTS

Petitioners, Gerald Adler and Gisela Adler, husband and wife, resided in Visalia, California at the time they filed the petition in this case.

Petitioners filed their 1974 Federal joint income tax return on April 12, 1975. Through successive Forms 872, Consent to Extend the Time to Assess Tax, and a Form 872-A, Special Consent to Extend the Time to Assess Tax, the time to assess for taxable year 1974 was extended indefinitely. All of the Forms 872 and the Forms 872-A were timely and properly executed by respondent.

On April 8, 1976 petitioners filed their Federal joint income tax return for taxable

year 1975. Through successive Forms 872 and a Form 872-A the time to assess for taxable year 1975 was extended indefinitely. Both Forms 872 and the Forms 872-A for taxable year 1975 were properly and timely executed by respondent.

Petitioners filed their 1977 Federal joint income tax return on June 14, 1978. On January 25, 1981, petitioners signed a Form 872-A indefinitely extending the time to assess for taxable year 1977. The form 872-A was timely and properly executed by respondent.

On May 23, 1984 petitioners' counsel sent a letter addressed to the Internal Revenue Service, Fresno, California. The letter included: a Form 2848, Power of Attorney in favor of Henry D. Nunez; a request for copies of all Forms 872 and 872-A signed by petitioners for taxable years 1974, 1975 and

1977; and the following statement "I hereby revoke, cancel and nullify any waivers that have been executed by my clients or their representatives in favor of the Internal Revenue Service * * * for the above mentioned tax periods." The language purporting to revoke the Forms 872 and 872-A executed by petitioners. It reiterated petitioners' request to revoke the Forms 872 and 872-A for tax years 1974, 1975, and 1977. Again, the letter set forth the taxpayer's name and identification number, type of return involved, and the taxable years in question.

On September 20, 1985 petitioners' counsel wrote a third letter containing language purporting to "revoke, cancel and nullify any waivers of the statute of limitations." This letter was sent once again to Mr. Mckinley of the San Jose, California office of the Internal Revenue Service.

No Forms 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, were ever sent by petitioners to the Internal Revenue Service office handling petitioners' 1974, 1975, and 1977 tax returns. The IRS did not respond to petitioners' counsel's letters. On December 23, 1986, respondent mailed a statutory notice of deficiency to petitioners and a copy thereof to petitioners' counsel.

OPINION

The issue for decision is whether the statute of limitations bars assessment of income tax for the taxable years 1974, 1975, and 1977. The general rule provided by section 6501(a) is, taxes must be assessed within three years form the date the tax return was filed. The Secretary and a taxpayer may enter into an agreement altering the general rule by extending the period for

assessment. Section 6501(c)(4).

In the instant case, petitioners and respondent extended indefinitely the period of limitations on assessment of tax for the three years before this Court, by using successive Forms 872 and a Form 872-A. The point of contention is whether petitioners effectively terminated the agreements extending the period of limitations with letters sent by petitioners to respondent.

We have consistently held:

> The bar of the statute of limitations is an affirmative defense, and the party raising it must specifically plead it and carry the burden of proof with respect thereto. Rules 39, 142(a). Where the party pleading such issue makes a showing that the statutory notice was issued beyond the normally applicable statute of limitations, however, such party has established a prima facie case. At that point, the burden of going forward with the evidence shifts to the other side, and the other party has the burden on introducing evidence to show that the bar of the statute is not applicable. Where the other party makes such a showing, the burden of going forward with the evidence then shifts back tot he party pleading the statute, to show that the alleged exception is invalid or

otherwise not applicable. The burden of proof, i.e., the burden of ultimate persuasion, however, never shifts form the party who pleads the bar of the statute of limitations. * * * [Adler v. Commissioner, 85 T. C. 535, 540 (1985).]

Petitioners have specifically pleaded the statute of limitations as an affirmative defense. They have also made a showing that the statutory notice was issued beyond the normally applicable period of limitations. By establishing a prima facie case petitioners made it incumbent upon respondent to go forward with evidence to show that the bar of the statute is not applicable.

Respondent asserts the Forms 872-A utilized by the parties provides, on its face, the exclusive methods that must be employed to terminate the agreement it represents. Form 872-A reads in part:

(1) The amount of any Federal Income Tax Due on any Return(s) made by or for the above taxpayer(s) for the period ended [Date] may be assessed on or before the 90th (ninetieth) day after: (A) The Internal Revenue Services

office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend The Time To Assess Tax, for the taxpayer(s).***[2]

Respondent never received a Form 872-T from petitioners. Nor do petitioners claim to have sent a Form 872-T to respondent for the years at issue. Therefore, respondent asserts, the period of limitations had not expired prior to the issuance of the statutory notice for these years. Respondent has carried its burden of showing that the bar of the statute of limitations is not applicable. The burden of ultimate persuasion resides with petitioners to show that such exception is not valid.

Petitioner asserts that Form 872-T is not the exclusive means by which a taxpayer can revoke a Form 872-A. Petitioner sets forth

---

[2] Form 872-A provides other methods of revocation which are not applicable in this case.

four arguments why the Forms 872-A should be considered revoked by means other than a Form 872-T:

1) Form 872-A is ambiguous on its face with respect to the requirements of revocation;

2) contract principles should apply and, if they do they would necessitate a finding that the 872-a is an invalid contract;

3) Respondent should be estopped from requiring the Form 872-T to terminate Forms 872-A;

4) The Due Process clause of the Fifth Amendment will be violated if the statute of limitations does not bar assessment.

Petitioners' most significant argument is that Form 872-A is ambiguous on its face. In Ribb v. Commissioner, T. C. Memo. 1988-379, this Court found that Form 872-A unambiguously provides that it may be terminated only by the

performance of certain acts. The only way for petitioners to revoke the Forms 872-A is by sending a properly addressed completed, and executed Form 872-T to the Internal Revenue Services Center handling their matter. In Grunwald v. Commissioner , 86 T.C. 85, 89 (1986), this Court stated "A deal is after all a deal, and fairness dictates that both parties adhere to the provisions of the document they both voluntarily signed." (Emphasis added.) Petitioners' never sent a Form 872-T to respondent. Therefore, we reject petitioners' argument and hold in the absence of a Form 872-T, the Forms 872-A were not revoked.

Petitioners contend that contract principles should apply, therefore, no valid contract exists. Petitioners' contention turns on the fact that no consideration inured to the benefit of petitioners upon signing the

Forms 872-A. In Piarulle v. Commissioner, 80 T.C. 1035 (1983), this Court held that Form 872-A is an unilateral waive of a defense and not a contract. While contract principals may be considered for guidance they are not dispositive. No consideration is necessary to give effect to such a waiver. Tallal v. Commissioner, 77 T.C. 1291, 1294 (1981); Ribb v. Commissioner, supra. Thus, this argument by petitioners is also rejected.

Petitioners' estoppel argument is rejected as well. As stated in Piarulle v. Commissioner, supra at 1044, there are four requirements that must be met before equitable estoppel will apply: 1) A false representation or wrongful misleading silence; 2) an error in statement of fact; 3) the one claiming the benefits of estoppel must not know the true facts; and 4) the same person must be adversely affected by the acts or

statements of the one against whom estoppel is claimed. Equitable estoppel is applied against the Government only with extreme caution and restraint. Boulez v. Commissioner, 76 T.C. 209 (1981), affd. 810 F.2d 209, 214-215 (D.C. Cir. 1987). Petitioners have not shown the facts in this case meet any of the four requirements listed above.

Due Process entitles a taxpayer to an unbiased hearing before the government can deprive him of his life, liberty or property. Goss v. Lopez, 419 U.S. 565 (1975). The United States Tax Court, as a prepayment forum, provides such an unbiased hearing. Therefore, we do not accept petitioners' argument that they have been denied due process by the government's refusal to give effect to petitioners' attempts at revoking Forms 872-A by means other than a Forms 872-T.

We find that the Forms 872-A executed by these parties were not revoked by petitioners' counsel's letters, therefore, the assessment for the years 1974, 1975, and 1977 is not barred by the statute of limitations.

To reflect the foregoing,

Decision will be entered under Rule 155.

APPENDIX C[1]

SECTION 6501 OF THE
INTERNAL REVENUE CODE OF 1954
26 U.S.C. §6501

§ 6501. Limitations on assessment and collection

(a) General rule.-Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

(c) Exceptions.-

(4) Extension by agreement.-Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so

---

[1] Because of the length of this statute only the text pertinent to this matter is reproduced in this appendix.

agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(2)

No. 91-128

Supreme Court, U.S.
FILED
AUG 21 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD ADLER AND GISELA ADLER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

RICHARD FARBER
ROBERT L. BAKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the assessment of additional income tax for petitioners' 1974, 1975 and 1977 taxable years is barred by the statute of limitations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

California v. *Taylor*, 353 U.S. 553 (1957)	6
Durovic v. *Commissioner*, 487 F.2d 36 (7th Cir. 1973), cert. denied, 417 U.S. 919 (1974)	6
Fendell v. *Commissioner*, 906 F.2d 362 (8th Cir. 1990)	6
Hormel v. *Helvering*, 312 U.S. 552 (1941)	6
Kelley v. *Commissioner*, 877 F.2d 756 (9th Cir. 1989)	6-7
Siben v. *Commissioner*, 930 F.2d 1034 (2d Cir. 1991)	6
Singleton v. *Wulff*, 428 U.S. 106 (1976)	6
Youakium v. *Miller*, 425 U.S. 231 (1976)	6

Statutes:

Internal Revenue Code (26 U.S.C.):

§ 6031(a)	6
§ 6501	6
§ 6501(a)	5, 6
§ 6501(c)(4)	5
§ 6503	
§ 6503(a)(1)	5

Miscellaneous:

B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* (5th ed. 1987)	6

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-128

GERALD ADLER AND GISELA ADLER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported, but the decision is noted at 930 F.2d 26 (Table). The memorandum opinion of the United States Tax Court (Pet. App. 3a-16a) is reported at 57 T.C.M. (CCH) 1376.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1991. The petition for a writ of certiorari was filed on July 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed their joint 1974, 1975 and 1977 federal income tax returns on April 12, 1975, April 8, 1976, and June 14, 1978, respectively. Petitioners thereafter executed Forms 872 (Consent to Extend the Time to Assess Tax) and Forms 872-A (Special Consent to Extend the Time to Assess Tax) that extended indefinitely the limitations period for assessment of any deficiency for these tax years.[1] These extension agreements were properly countersigned by a duly authorized employee of the Internal Revenue Service (Pet. App. 5a-6a).

On May 23, 1984, petitioners' counsel sent a letter to the IRS at its offices in Fresno, California. The letter requested copies of all Forms 872 and 872-A signed by petitioners for taxable years 1974, 1975 and 1977, and stated that "I hereby revoke, cancel and nullify any waivers that have been executed by my clients or their representatives in favor of the Internal Revenue Service * * * for the above mentioned tax periods." Pet. App. 6a-7a. Petitioners' counsel thereafter sent similar letters to the IRS at its offices in San Jose, California. *Id.* at 7a.

The IRS did not respond to these letters. Neither petitioners nor their counsel, however, ever filed Form 872-T (Notice of Termination of Special Con-

---

[1] Form 872-A, as executed by petitioners, provides in relevant part (Pet. App. 10a-11a):

> (1) The amount of any Federal Income Tax Due on any Return(s) made by or for the above taxpayer(s) for the period ended [*Date*] may be assessed on or before the 90th (ninetieth) day after: (A) The Internal Revenue Service[] office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time To Assess Tax, for the taxpayer(s). * * *

sent to Extend the Time to Assess Tax) with the IRS for any of the relevant years (Pet. 7; Pet. App. 8a, 11a). See note 1, *supra*.

2. On December 23, 1986, the Commissioner mailed statutory notices of deficiency to petitioners with respect to taxable years 1974 through 1979. The deficiencies resulted from disallowance of various losses claimed by petitioners for their partnership interests in tax shelters (Pet. 7; Pet. App. 8a).

Petitioners filed a timely petition for redetermination in the Tax Court. Petitioners claimed that the deductions for their losses from the partnerships were proper and that, in any event, the notices of deficiency were barred by the statute of limitations.[2] Petitioners asserted that they had revoked the agreements extending the statute of limitations before the notices of deficiency were issued (Pet. App. 9a).

On a stipulated factual record, the parties filed cross-motions for partial summary judgment on the question whether the extension agreements were still effective as of the date the notices of deficiency were issued. Even though the express language of Form 872-A specifies that taxes may be assessed at any time within 90 days after the taxpayer submits a "Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax" (see note 1, *supra*), and even though petitioners had never submitted the required Form 872-T to the IRS, petitioners nonetheless contended that the extension agreements had been validly terminated in this case by the letters they sent to the IRS prior to the issuance of the deficiency notices (Pet. App. 4a, 8a-12a).

---

[2] After filing the petition, petitioners entered into a settlement with the IRS with respect to the years 1976, 1978 and 1979 (Pet. App. 4a).

The Tax Court rejected petitioners' contention and held that the notices of deficiency were timely. The court noted that Form 872-A unambiguously provides that assessments may be issued so long as a Form 872-T has not been filed, and concluded that, since petitioners admittedly had not mailed Form 872-T to the IRS, the Forms 872-A had not been terminated prior to the issuance of the notices of deficiency (Pet. App. 11a-13a, 16a). The court also rejected petitioners' alternative arguments that the extension agreements were invalid for lack of consideration (*id.* at 13a-14a) and that the Commissioner should be equitably estopped from seeking to collect additional taxes (Pet. App. 14a-15a).

3. On appeal, petitioners sought to advance a new contention. They argued for the first time that (i) the statute of limitations barred adjustment to the *partnership* returns at the time the notices of deficiency for the *individual* returns were issued and (ii) that the Commissioner was therefore precluded from adjusting petitioners' individual tax liability based upon adjustments to losses claimed by petitioners from their partnership interests. While disputing both the factual and legal bases of this new claim, the Commissioner urged the court to decline to consider it because it had not been raised in the Tax Court.

The Ninth Circuit did not address petitioners' new position on appeal. Instead, the court stated only that, "[f]or the reasons set forth by the Tax Court, we AFFIRM" (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct. Moreover, the issue presented in the petition was not properly raised by petitioners and was not addressed by the courts below. Further review by this Court is therefore not warranted.

1. By stipulation of the parties, the only issues presented for decision in the Tax Court were whether petitioners' attempted revocation of the extension agreement was effective and whether the deficiency notices subsequently issued by the Commissioner were therefore barred by the statute of limitations (Pet. App. 4a, 8a-12a). The Tax Court held that the attempted revocations of the Forms 872-A were ineffective and that the notices of deficiency were therefore issued within the statute of limitations (Pet. App. 1a, 13a, 16a). See 26 U.S.C. 6501(a), 6501 (c)(4), 6503(a)(1). The Ninth Circuit affirmed for the reasons stated in the Tax Court opinion (Pet. App. 1a-2a).

Petitioners do not seek review of the courts' holding on this issue. See Pet. 14-22. Instead, petitioners seek to have this Court decide an issue that was not raised in the Tax Court and was not addressed by the courts below: (i) whether adjustments to the returns of the partnerships in which petitioners had invested were barred by the statute of limitations and, if so, (ii) whether that barred the Commissioner from making adjustments to petitioners' individual returns with respect to losses they claim from their partnership interests.

The Court should decline petitioners' request to consider issues that petitioners failed properly to present below. "It is the general rule, of course, that a federal appellate court does not consider an issue

not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). See *Youakium* v. *Miller*, 425 U.S. 231, 234 (1976); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). Petitioners have failed to demonstrate any reason why an exception to this rule should be made in this case. Indeed, petitioners do not even acknowledge that the issue for which they seek review was not addressed by the courts below.

The issue ostensibly presented in the petition is especially inappropriate for review in this case because petitioners' argument is based on the unsupported factual assertion that the statute of limitations in Section 6501 (26 U.S.C. 6501) bars adjustment to the partnership returns. Even if Section 6501 applies to the information tax returns filed by partnerships,[3] the stipulated record does not establish

---

[3] Section 6501 establishes a limitations period for certain tax assessments. A partnership is not itself, however, a taxable entity. The income of a partnership is attributed directly to, and taxed on the returns of, the partners. See B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 1.07, at 1-21 (5th ed. 1987). It is the Commissioner's position that the filing of the information return required for partnerships under Section 6031(a) of the Code (26 U.S.C. 6031(a)) does not trigger the running of the statute of limitations for assessments in Section 6501(a). Consequently, as long as the individual returns of the partners remain open, adjustment may be made to those returns without regard to the filing date of the partnership's return. The only courts of appeals that have addressed this specific issue have agreed with the Commissioner's position. *Siben* v. *Commissioner*, 930 F.2d 1034 (2d Cir. 1991); *Durovic* v. *Commissioner*, 487 F.2d 36 (7th Cir. 1973), cert. denied, 417 U.S. 919 (1974). There are decisions in similar contexts, however, that reach a different result. See *Fendell* v. *Commissioner*, 906 F.2d 362 (8th Cir. 1990) (trust return); *Kelley* v. *Commis-*

that adjustments to the returns of the partnerships in which petitioners had invested were time barred under that statute. For example, neither the date of the partnership returns nor the presence or absence of any extension pertaining to those returns is addressed in the stipulation.[4] In these circumstances, it is particularly inappropriate for this Court to depart from the general rule that it will not decide matters not raised in or addressed by the courts below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

RICHARD FARBER
ROBERT L. BAKER
Attorneys

AUGUST 1991

---

sioner, 877 F.2d 756 (9th Cir. 1989) (Subchapter S corporation return). Although the Commissioner disagrees with those decisions, the record of this case is not adequate for resolution of that disagreement.

[4] See Excerpts of Record (at 10-31) filed by petitioners as appellants in the court of appeals.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45031

Supreme Court, U.S.
FILED
SEP 16 199
OFFICE OF THE CL

NO: 91-128

IN THF SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

GERALD ADLER and GISELA ADLER

Petitioner

v.

COMMISSIONER INTERNAL REVENUE SERVICE

Respondent

On Appeal from the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER

HENRY D. NUNEZ 063412
Attorney at Law
4969 E. Clinton, Suite 111
Fresno, California 93727
(209) 456-2494

Counsel of Record

QUESTION NO. I. Whether the Commissioner of Internal Revenue Service has met its burden of proof that the Statute of Limitations is not a bar to the Notice of Assessment of a Partner when the Commissioner failed to introduce any evidence that a consent to extend the time to assess the tax was given by the partnership.

QUESTION NO. II. Whether the principle set out in Kelly v. Commissioner, 877 F2d 756 (9th Cir.1989) and Fendell v. Commissioner, 906 F2d 36 (8th Cir.1990) applies to the partnership tax return, the principle is that in order for the Commissioner to adjust tax liability, he must do so at the source of income, in this matter the partnership.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION OF COURT BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
CONCLUSION	7

APPENDIX

A. OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (UNREPORTED)

B. MEMORANDUM OF FINDINGS OF FACT AND OPINION OF THE UNITED STATES TAX COURT 57 (T.C. MEMO 1376(1989))

C. INTERNAL REVENUE CODE SECTION 6501(A)

TABLE OF AUTHORITIES

CASES PAGE

AVERS v. COMMISSIONER,
55 T.C.MEMO 678(1988) 6

FENDALL v. COMMISSIONER,
906 F.2d 362(8th Cir.1988) . . . 3, 6

KELLY v. COMMISSIONER,
877 F.2d 756(9th Cir.1989) . . . 3, 5

STATUES

INTERNAL REVENUE CODE
SECTION 6501(a) 2, 4,

INTERNAL REVENUE CODE
SECTION 6501(c)(4) 2

28 USC SECTION 2101(a) . . . 2

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM 1990

No. 91-128

GERALD ADLER and GISELA ADLER

Petitioner - Appellant

v.

COMMISSIONER INTERNAL REVENUE SERVICE

Respondent - Appellee

On Appeal from the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit of which review is sought (Pet.App.A, page 1a) is unreported. That ruling affirmed the opinion of the U.S. Tax Court, based upon the reasons set forth in the Tax Court opinion.

(Pet.App.A, page 1a). The Memorandum and Findings of Fact and Opinion of the United States Tax Court is reported in 57 T.C. Memo 1376 (1989) (Pet.App.B, page 2a). The Honorable William M. Fay of the United States Tax Court ruled that the Statute of Limitations was not a bar to the tax assessment of tax imposed on the Petitioners for the tax years 1974, 1975 and 1977.

JURISDICTION

The unpublished opinion of the United States Court of Appeal was entered on April 4, 1991. The jurisdiction of this Court is invoked under 28 USC §2101(a).

STATUTORY PROVISION INVOLVED

The pertinent provision of the statute involved is Internal Revenue Code Section 6501(a) and (C)(4) which is set out verbatim in Pet.App.C, page 17a and 18a.

STATEMENT

The stipulations entered into by

Respondent and Petitioner did not foreclose the issues of whether or not the years involved are open or closed pursuant to IRC §6501. This is the single issue raised by the petitioner. Petitioner has not raised any new issues but has supplemented its argument based upon the decisions rendered in Kelly v. Commission 877 F2d 756 (9th Cir. 1989) and Fendell v. Commissioner 906 F2d 36 (8th Cir. 1990) which cases were decided after the briefs were submitted in the Tax Court. These supplemental arguments were properly raised in the appeal to the 9th Circuit. The Ninth Circuit rendered a decision and stated only "[f] or reasons set forth by the Tax court, we AFFIRM" (Petition App. 1(a).

Petitioners' position is based solely upon the facts presented to the Trial Court and Petitioners' request this court to grant this Petition for Certiorari, since Internal Revenue Code §6501 is a bar to the assessment.

No new evidence is necessary to support Petitioners position which is purely a matter of law.

ARGUMENT

In their opposition brief Respondent asserts that Petitioner seek to have this court decide an issue that was not raised in the Tax Court and/or was not addressed by the courts below. Respondents contention is without merit.

1. As stated previously the only issue raised by Petitioner is whether the Statue of Limitations is a bar to the statutory notices issued by the Commissioner of Internal Revenue Service. Respondent attempts to restrict this issue by restating the issue as one "whether Petitioner's attempted revocation of the extension agreement was effective and whether the deficiency notice subsequently issued by the Commissioner were therefore barred by the Statue of Limitations." (Opp Brief 5) This is

one of the arguments presented to the Tax Court by the Petitioner and Petitioner's reasserted this contention in their appeal. Petitioners however did not restrict their argument to this one sub-issue.

Pursuant to the stipulation entered into by Petitioners and Respondent there is no limitation and/or qualification to the defense of the Statute of Limitations is a bar. In fact, the Tax Court stated that "[t] he issue for decision is whether the Statue of Limitations barr assessment of income tax for the taxable years 1974, 1975 and 1977." (Pet. App. 8(a)) addressed this issue and found in favor of Respondent.

Petitioner on appeal raised the same issue but supplemented their argument based upon the finding of Kelly v. Commissioner, supra and Fendell v. Commissioner, supra.

The argument is that in order for the Commissioner to adjust tax liability, he must

do so at the source of income, here the partnership. And if no extension of time is obtained to assess the tax on a partnership in addition to the individual then any attempt by the Commissioner to assess the tax after three years is barred pursuant to Internal Revenue Code §6501.

This case is a proper case for review since the Petitioners were not the managing partners; the managing partner was not available, and the partnership's records were not available and/or were lost and destroyed. The issue of profit motive can only be determined at the partnership level for a partnership Aver v. Commissioner (1988) 55 TCM 678, and since the partnership records and managing partner were not available, Petitioners settled the issues of entitlement to the partnership matters since they would have been prevented from introducing evidence as to their individual profit motive to prove

entitlement to deductions and credits. Further the tax years had been pending for over 11 years. The Statute of Limitations exists in part so that after some time persons can be confident that their affairs are closed and they can dispose of old records. Petitioners assert that the Statute of Limitations is a barr to the assessment as made by respondent.

CONCLUSION

For the reasons set forth above Petitioners respectfully request this court to grant the Petition for Writ of Certiorari.

Respectfully Submitted,

September 16, 1991

HENRY D. NUNEZ
Attorney at Law
4969 E. Clinton Ave.
Suite 111
Fresno, CA 93727
(209) 456-2494

Counsel of Record
For Petitioner